

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ANDI DEPRIEST**

Claimant

VS.

**HERITAGE HEALTH CARE LLC**

Respondent

AND

**SAFETY NATIONAL CASUALTY CORPORATION**

Insurance Carrier

Docket No. 1,028,483

**ORDER**

Respondent appeals the January 10, 2008 Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded benefits for a 10 percent permanent partial whole body disability on a functional basis after the ALJ determined the opinion of claimant's medical expert, board certified orthopedic surgeon Edward J. Prostic, M.D., that claimant had ongoing radiculopathy, entitling her to the 10 percent rating, was the most credible.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, the parties stipulated at the regular hearing that claimant was paid \$1,033.26 in temporary partial disability benefits (TPD). (No added temporary total disability benefits (TTD) or TPD were requested by claimant.<sup>1</sup>) The exact dates of the payments of TPD are not contained in this record. This sum was not taken into consideration in the final Award of the ALJ. The Board will correct this oversight. The Board heard oral argument on May 6, 2008.

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<sup>1</sup> R.H Trans. at 6.

### ISSUE

What is the nature and extent of claimant's injury? Claimant acknowledges her award is limited to a functional impairment under K.S.A. 44-510e as she had, at the time of the regular hearing, obtained employment with an lola pharmacy earning at least 90 percent of the average weekly wage claimant was earning on the date of the accident.

### FINDINGS OF FACT

Claimant began working for respondent on February 15, 2006, as a full-time certified nurses aide (CNA) for respondent. On March 26, 2006, claimant was assisting a resident of respondent's health care facility when the resident began to fall. Claimant caught the resident before she hit the floor, but suffered an injury to her low back in the process. At that time, claimant experienced pain down both legs. She advised Tina, the charge nurse, and was taken to the emergency room where she was evaluated and given pain medication. Claimant was advised to follow up with respondent's workers compensation doctor, Dr. Singer in lola, Kansas. Claimant was continued on pain medication and then was referred by Dr. Singer to board certified preventive medicine specialist William R. Black, M.D.

Dr. Black first examined claimant on April 14, 2006, at which time he diagnosed claimant with right S1 sprain and a right-sided low back strain. Claimant was returned to work with a 20-pound push/pull limitation and told to alternate standing, sitting and walking every 30 minutes. Claimant was also referred for an MRI, which displayed a small disc herniation at L5-S1 and L5-S1 disc space narrowing consistent with degenerative disc disease. However her main problem remained the S1 sprain. Claimant's symptoms included low back pain, right hip pain and pain down claimant's right leg. When Dr. Black saw claimant on May 25, 2006, her leg pain remained fairly constant, but stopped at claimant's right knee. Dr. Black determined that claimant needed to be referred to a neurosurgeon or a neurologist for epidural steroid injections.

Dr. Black's next examination was on June 26, 2006, at which time claimant's pain was gone. Claimant had been receiving injections from Dr. Knudsen in her low back and right side, and was "doing great."<sup>2</sup> Dr. Black's examination of claimant was normal, with a full range of motion of the lower extremities and full reflexes. Claimant was returned to full duty with no restrictions. Dr. Black determined that, pursuant to the fourth edition of the *AMA Guides*,<sup>3</sup> claimant had no permanent functional impairment. When Dr. Black next

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<sup>2</sup> Black Depo., Ex. 2 (June 26, 2006 Flow Sheet).

<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

examined claimant on July 10, 2006, claimant indicated her right hip was doing well, but her left hip was “feeling out of place”.<sup>4</sup> Dr. Black did not address the left hip complaint as he did not feel the new complaint was related to her work injury.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on April 25, 2006. At that time, claimant had a constant ache in the center of her low back with radiation down her right leg toward the foot. Claimant had previously displayed constant numbness and tingling, but that was occurring only occasionally at the time of the examination. Dr. Prostic found claimant’s range of motion to be limited and her right calf was atrophied, measuring one-quarter inch less in circumference than her left. Dr. Prostic determined that claimant had symptoms and findings consistent with a protrusion of the L4-5 disc on the right. Dr. Prostic also determined that claimant might be helped by epidural steroid injections. He believed claimant had sustained a herniation of the disc on the right, most likely at L4-5. Claimant was limited to light duty only and was to avoid more than minimal bending at the waist, pushing or pulling, and no use of vibrating equipment.

Claimant was next examined by Dr. Prostic on October 20, 2006. At that time, claimant reported pain in her right low back going to the posterior right knee with numbness and tingling. During his examination of claimant, Dr. Prostic found her posture sitting, standing and walking was satisfactory, with tenderness at the lowest right paraspinous muscles. Claimant displayed no weakness in either leg, sensation was satisfactory, reflexes were symmetrical and there was no calf atrophy noted. Claimant’s straight leg raise maneuver was negative for sciatica, but claimant did have mild hamstring tightness. Dr. Prostic rated claimant at a 10 percent permanent partial impairment to the whole body on a functional basis based on the fourth edition of the *AMA Guides*.<sup>5</sup> Dr. Prostic testified that he did not use the DRE method of rating under the *AMA Guides* as this was not a single-injury event, but rather a repetitious trauma. Therefore, he used the range of motion model and rated claimant at 13 percent to the whole body, which he reduced to the final 10 percent rating. Dr. Prostic agreed that when determining impairment for a single-injury event, the DRE model was the preferred method. He also agreed that if he used the DRE method, claimant’s rating under the fourth edition of the *AMA Guides*<sup>6</sup> would be 5 percent of the whole body.

Claimant was examined and treated by her family practitioner, Earl Walter, D.O., in Iola, Kansas, on September 6, 2006. This examination was for a medication refill

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<sup>4</sup> Black Depo. at 43.

<sup>5</sup> *AMA Guides* (4th ed.).

<sup>6</sup> *Id.*

and consult on medication. Claimant had tenderness in her low back and complained of radiating pain down her right leg. Dr. Walter did not examine claimant after September 6, but did continue to provide refills of her prescriptions. He could not say whether claimant would need medication on a long-term basis.

Claimant's deposition was taken on July 12, 2007. At that time, a series of Daily Pain Description (DPD) documents were placed into the record. These DPD forms, which were provided to claimant by respondent, were filled out periodically. The initial forms, filled out on March 27, 28, 29 and 30, 2006, displayed pain, on the white form, at claimant's low back and right hip. The form dated March 31, 2006, displayed pain in the low back and right hip, and radiculopathy down the right leg to the right foot. The April 3, 2006 form was without right leg pain, but the radiculopathy had returned on April 4, 2006, and remained until April 11, 2006. The April 12, 2006 white form drawing was blank. The next form is dated April 27, 2006, and contains pain drawings indicating pain in the area of the low back and right hip. No leg pain is indicated. While claimant indicated right hip pain on several of those drawings, no doctor provided a separate rating for claimant's hip. Claimant provided periodic drawing indications through May 18, 2006, with no radiculopathy indicated after April 11, 2006.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>7</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>8</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>9</sup>

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the

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<sup>7</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>8</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>9</sup> K.S.A. 2005 Supp. 44-501(a).

employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.<sup>10</sup>

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>11</sup>

The ALJ determined that the rating opinion of Dr. Prostic was the most credible and assessed claimant a 10 percent whole body functional impairment. The Board finds the opinion of Dr. Prostic to be somewhat inflated. Dr. Prostic found radiculopathy based on claimant's subjective complaints, without objective clinical evidence in support. Dr. Prostic also agreed that if the DRE was used, under the fourth edition of the *AMA Guides*,<sup>12</sup> claimant's rating would be limited to 5 percent to the body as a whole. Finally, Dr. Prostic used the range of motion method of assessing claimant an impairment based on a misunderstanding that this was an accident experienced by a series of injuries rather than a one-time incident.

Dr. Black, on the other hand, found claimant to have no permanent impairment from this accident, even though she continues to experience pain and, according to Dr. Walter, is in need of ongoing pain medication management. The Board finds the most credible opinion in this record is that of Dr. Prostic when he was asked to consider a rating using the DRE under the *AMA Guides*. That resulting 5 percent whole body rating is found to be the most accurate and is adopted by the Board for the purposes of this award. Therefore, the Award of the ALJ is modified accordingly.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 5 percent permanent partial

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<sup>10</sup> K.S.A. 44-510e.

<sup>11</sup> K.S.A. 44-510e(a).

<sup>12</sup> *AMA Guides* (4th ed.).

disability to the whole body on a functional basis for the injuries suffered on March 26, 2006.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated January 10, 2008, should be, and is hereby, modified to award claimant a 5 percent permanent partial disability to the whole body on a functional basis for the injuries suffered on March 26, 2006, while working for respondent.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Andi DePriest, and against the respondent, Heritage Health Care LLC, and its insurance carrier, Safety National Casualty Corporation, for an accidental injury which occurred on March 26, 2006, and based upon an average weekly wage of \$402.13.

Claimant is entitled to temporary partial disability compensation in the amount of \$1,033.26, followed by 20.75 weeks of permanent partial disability compensation at the rate of \$268.10 per week totaling \$5,563.08 for a 5 percent permanent partial disability, making a total award of \$6,596.34. As of the date of this Award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.<sup>13</sup> The provision in the Award approving claimant's attorney fee retained is set aside.

In all other regards, the Award of the ALJ is affirmed so long as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

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<sup>13</sup> K.S.A. 44-536(b).

Dated this \_\_\_\_ day of May, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge